

IN THE MATTER OF
THE PERMIT OF:

PERMIT NO. DL57-23121

FINDINGS OF FACT AND CONCLUSIONS OF LAW

¹ Beer and wine (grocery) dealer located in an incorporated area. Ind. Code 7.1-3-5-2(a).

7. On October 25, 2007, the Hearing Judge issued an Order Remanding Case to Local Board for Rehearing and Further Investigation for the limited purpose of allowing the Local Board to explore the issue of need and desire in the community.

8. On February 12, 2008, the Local Board held a hearing and voted three (3) to one (1) to deny the application.

9. On February 19, 2008, the ATC adopted the Local Board's recommendation.

10. On March 6, 2008, the Applicant timely filed its request for administrative review and request for appeal hearing within the fifteen (15) day deadline required by 905 IAC 1-36-2.

11. No remonstrators filed a petition for intervention, as required by 905 IAC 1-36-2.

12. On April 22, 2008, the Hearing Judge conducted a hearing regarding the Applicant's appeal.

III. EVIDENCE BEFORE THE LOCAL BOARD

A. The following individuals testified before the Local Board in favor of the Applicant in this cause:

1. Dennis Spegal, Vice President of GasAmerica
2. Greg Dietrich, District Manager (Northern Indiana) of GasAmerica
3. Dave Aldridge, Store Manager of GasAmerica store in Kendallville
4. Brian Tuohy, Attorney for GasAmerica

B. The following individuals testified before the Local Board against the Applicant in this cause:

1. Suzanne Hanshoe, Remonstrator and Mayor of Kendallville
2. Regan Ford, Remonstrator and City Councilman At Large in Kendallville
3. Rob Wiley, Remonstrator and Chief of Police in Kendallville

C. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:

1. Affidavit of Stephanie White, with state-wide survey attached (Exhibit A)
2. Affidavit of Stephanie White, with area-specific survey attached (Exhibit B)

D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:

1. Petition with names and addresses of those opposed to another alcohol permit

IV. EVIDENCE BEFORE THE COMMISSION

A. The following individuals testified before the Commission in favor of the Applicant in this cause:

1. Dennis Spegal, Vice President of GasAmerica
2. Brian Tuohy, Attorney for GasAmerica

B. The following individuals testified before the Commission against the Applicant in this cause:

1. Suzanne Hanshoe, Remonstrator and Mayor of Kendallville
2. Kaylyn Smith, Remonstrator and President of the Mayor's Youth Advisory Council

C. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:

1. Summary of Evidence In Support of the Need for Services at the Location of the Permit (Exhibit A)
2. Summary of Evidence In Support of the Desire of the Neighborhood or the Community to Receive Such Services (Exhibit B)
3. Summary of Evidence Showing Remonstrators' Objections to the Issuance of the Permit are Speculative and Ambiguous, and the Local Board's Decision was Arbitrary (Ex. C)
4. Affidavit of Cynthia M. Van Vooren, with aerial photograph attached (Ex. E)

D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:

1. TRIP Inspection Report showing tobacco violations

V. FINDINGS OF FACT

1. GasAmerica, located at 606 Fairview Blvd., Kendallville, Indiana 46755, is an applicant for an ATC Type 115 beer and wine permit, Permit No. DL57-23121. (ATC File).

2. GasAmerica, an Indiana based company headquartered in 2700 West Main Street, Greenfield, Indiana, has existed for approximately twenty-four (24) years, being incorporated in the State of Indiana in 1983. (LB Hearing, ATC file).

3. GasAmerica is in good standing with the Indiana Secretary of State. (ATC File).

4. The letters G, A and S in the word GasAmerica stand for "Grocery And Services". GasAmerica's stated business purpose is to sell groceries and gasoline in a convenient manner. (LB Hearing, ATC File).

5. GasAmerica operates eighty-nine (89) convenience stores: seventy-five (75) in Indiana and fourteen (14) in Ohio. (LB Hearing, Appeal Hearing).

6. Of the eighty-nine (89) convenience stores, GasAmerica has ATC permits to sell beer and wine in sixty-three (63) of these stores: forty-nine (49) stores in Indiana and fourteen (14) stores in Ohio. (Appeal Hearing).

7. GasAmerica has never been cited for any violations in regard to its sale of alcohol in any GasAmerica store located in Indiana and Ohio holding an alcoholic beverage permit. (LB Hearing, Appeal Hearing).

8. GasAmerica's store at 606 Fairview Boulevard in Kendallville, Indiana ("Kendallville store") has been in operation for more than ten (10) years. (Appeal Hearing, ATC File).

9. The Kendallville store is typical of other GasAmerica stores throughout Indiana. (LB Hearing).

10. The Kendallville store is not located within two hundred feet (200') of a school or church. (LB Hearing, Appeal Hearing, ATC File).

11. At the Kendallville store, GasAmerica sells thousands of different products which are typically sold in Indiana grocery stores, including but not limited to: dairy products, milk, cheese, eggs, meat and prepared food products, fresh fruit, canned goods, and tobacco products. (LB Hearing, Appeal Hearing).

12. The Kendallville store sells the same or similar type of grocery products found at other stores that sell grocery products. (LB Hearing, Appeal Hearing).

13. Sales of food and grocery products at the Kendallville store are over One Million Dollars (\$1,000,000.00) annually, which is a significant portion of the Kendallville store's total sales. (LB Hearing, Appeal Hearing).

14. The Kendallville store is a similar store and operation to other nearby GasAmerica stores in neighbor counties that hold beer and wine permits, specifically the two (2) GasAmerica stores located in Angola, and the GasAmerica store located in Auburn, Indiana. (LB Hearing, Appeal Hearing).

15. The customers that shop in the GasAmerica stores located in Angola and Auburn also shop in the GasAmerica store located in Kendallville. (LB Hearing, Appeal Hearing).

16. Many customers that purchase beer and wine in the GasAmerica stores located in Angola and Auburn have asked to purchase beer and wine in the GasAmerica store located in Kendallville. (LB Hearing, Appeal Hearing).

17. There are often specific requests by GasAmerica's customers in the Kendallville store for the sale of beer and wine. (LB Hearing, Appeal Hearing).

18. GasAmerica conducted a state-wide survey of its customers. This survey generated One Thousand Seven Hundred and Forty-Eight (1,748) responses. Of these responses, about one-third ($1/3^{\text{rd}}$) of the customers (specifically, twenty-nine percent (29%)) expressed a desire that GasAmerica sell beer and wine. (LB Hearing, Appeal Hearing).

19. GasAmerica conducted a second survey limited specifically to its customers in the Kendallville store. This survey generated Seven Hundred (700) responses. Of these responses, about one-third (1/3rd) of the customers (specifically, twenty-nine percent (29%)) expressed a desire that GasAmerica sell beer and wine. (LB Hearing, Appeal Hearing).

20. The Kendallville store is located in a commercial district and surrounded by businesses with commercial uses. (LB Hearing, Appeal Hearing, ATC File).

21. There exists a Shell gas station and convenience store in Kendallville in close proximity to the GasAmerica store in Kendallville that sells groceries and gasoline, and has an ATC permit to sell beer and wine. (LB Hearing, Appeal Hearing).

22. There exists a Scott's Foods grocery store in Kendallville in close proximity to the GasAmerica store in Kendallville that sells groceries, and has an ATC permit to sell beer and wine. (LB Hearing, Appeal Hearing).

23. There exists a CVS drug store in Kendallville in close proximity to the GasAmerica store in Kendallville that sells groceries, and has an ATC permit to sell alcohol. (LB Hearing, Appeal Hearing).

24. There exists a Wal-Mart store in Kendallville in close proximity to the GasAmerica store in Kendallville that sells groceries and gasoline, and has an ATC permit to sell beer and wine. (LB Hearing, Appeal Hearing).

25. There exists a hotel and an Applebee's restaurant in Kendallville in close proximity to the GasAmerica store in Kendallville that each has an ATC permit to sell alcohol. (Appeal Hearing).

26. In order to compete on an equal footing with other stores and businesses in the Kendallville community that sell groceries and that also are allowed to sell alcoholic beverages, including other convenience stores, grocery stores, drugstores and retail stores, the Kendallville GasAmerica store needs an ATC permit to sell beer and wine. (LB Hearing, Appeal Hearing).

27. An ATC alcohol permit for GasAmerica to sell beer and wine is available in the town of Kendallville. (LB Hearing, Appeal Hearing, ATC file).

28. GasAmerica has a fine reputation within the Kendallville community as a good corporate citizen and such good reputation was acknowledged by a remonstrator. (LB Hearing, Appeal Hearing).

29. No businesses appeared at the LB Hearing to remonstrate against GasAmerica. (LB Hearing, Appeal Hearing).

30. Certain individuals appeared at the LB Hearing to remonstrate against the granting of Permit No. DL57-23121 to GasAmerica, but none owns a business nor resides next to the GasAmerica store in Kendallville. (LB Hearing, Appeal Hearing).

31. The remonstrators at the LB Hearing and the Appeal Hearing generally believed there were too many businesses that sold alcohol in the Kendallville area, and were concerned about purchases of alcohol by underage customers. (LB Hearing, Appeal Hearing).

32. GasAmerica is experienced at selling beer and wine as some of its stores in Ohio have sold this product for twenty (20) years. (LB Hearing).

33. All GasAmerica stores permitted to sell alcohol do not employ teenage cashiers. Rather, the cashiers in all GasAmerica stores that sell beer and wine must be over the age of twenty-one (21) years. (LB Hearing, Appeal Hearing).

34. GasAmerica trains its cashiers employed at all GasAmerica stores permitted to sell alcohol with a videotape training seminar, as well as an individual corporate training session. (LB Hearing).

35. GasAmerica's sales registers are programmed to automatically prompt the cashier to check a customer's identification when purchasing an alcoholic beverage. (LB Hearing).

36. GasAmerica has a "no tolerance policy" which means that any employee who sells tobacco or alcohol to an underage customer will have their employment automatically terminated. (LB Hearing).

37. There is no evidence or testimony that the Applicant herein is not qualified to hold the permit applied for, nor is there any reason to deny this permit at this particular location. (LB Hearing, Appeal Hearing, ATC File).

IV. CONCLUSIONS OF LAW

1. The ATC has jurisdiction over this matter pursuant to Ind. Code 7.1-1-2-2; Ind. Code 7.1-2-3-9.

2. The permit application was properly submitted pursuant to Ind. Code 7.1-3-1-4.

3. The ATC is commissioned to act upon proper application. *Id.*

4. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the ATC, including a public hearing. 905 IAC 1-36-7(a); Ind. Code 7.1-3-19-11(a).

5. The Hearing Judge may consider as evidence all documents in the ATC File, including the transcript of proceedings and exhibits before the Local Board. 905 IAC 1-36-7(a).

6. The Hearing Judge may also consider as evidence any codes and standards that have been adopted by an agency of this state. 905 IAC 1-36-8(e).

7. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon

the substantial and reliable evidence in the record of proceedings and on matters officially noted in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code 4-21.5-3-27(d).

8. GasAmerica, located at 606 Fairview Blvd., Kendallville, Indiana 46755, is an applicant for an ATC Type 115 beer and wine permit, Permit No. DL57-23121.

9. The proposed permit premises is not in a residential district as referred to in Ind. Code 7.1-3-19-13 and 905 IAC 1-18-1.

10. The proposed permit premises is more than two hundred feet (200') from a church or school. Ind. Code 7.1-3-21-11.

11. The Commission may issue a beer dealer's permit to an applicant who is the proprietor of a grocery store. Ind. Code 7.1-3-5-2(a).

12. The term "grocery store" means a store or part of a store that is known generally as a convenience store or food mart and is primarily engaged in the retail sale of automotive fuels and the retail sale of a line of goods that include milk, bread, soda and snacks. Ind. Code 7.1-1-3-18.5 (a)(2)(B).

13. GasAmerica has established that the Kendallville store is a convenience store or food mart which is primarily engaged in the retail sale of automotive fuels and the retail sale of a line of goods that include milk, bread, soda and snacks.

14. GasAmerica is a fit and proper applicant, has maintained a reputation for decency and law obedience, and is well qualified to hold an alcoholic beverage permit under Indiana law. 950 IAC 1-27-1; Ind. Code 7.1-3-9-10.

15. GasAmerica is of good moral character and in good repute in the community in which it does business, and is qualified to hold the permit it seeks. 950 IAC 1-27-1; Ind. Code 7.1-3-4-2(a)(2)(A).

16. The Applicant is not disqualified from holding an ATC beer and wine grocery permit. Ind. Code 7.1-3-4-2; Ind. Code 7.1-3-5-2; Ind. Code 7.1-3-15-2.

17. In determining whether to issue a permit, the Commission may consider the geographic desirability of the proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.

18. The Commission may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. *Id.*

19. "Need" means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a).

20. “Desire” means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).

21. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*

22. Where an Applicant shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b).

23. There are several stores that offer these services in the location, as well as in close geographic proximity, to the GasAmerica store in Kendallville. (LB Hearing, Appeal Hearing).

24. The Applicant conducted an area-specific survey (“Survey”) in December, 2007. (LB Hearing, Appeal Hearing).

25. Twenty-nine percent (29%) of the customers responding indicated that they would like GasAmerica to sell beer and wine at the Kendallville store. (LB Hearing, Appeal Hearing).

26. There are customers that purchase beer and wine in the GasAmerica stores located in Angola and Auburn that have asked to purchase beer and wine in the GasAmerica store located in Kendallville. (LB Hearing, Appeal Hearing).

27. There are often specific requests by GasAmerica’s customers in the Kendallville store for the sale of beer and wine. (LB Hearing, Appeal Hearing).

28. The Applicant has proven that there is a need for a beer and wine grocery permit at the Applicant’s location. 905 IAC 1-27-4(b).

29. The Applicant has proven that the neighborhood and community desire to receive the services of an alcoholic beverage permit at the Applicant’s location.

30. All laws shall be general and administered with uniform application throughout the State. *Ind. Constitution*, Art. IV, Sec. 23; See also, *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).

31. GasAmerica has submitted substantial evidence that it is qualified to hold an ATC Type 115 beer and wine grocery permit.

32. No evidence has been submitted which would disqualify GasAmerica from holding a Type 115 beer and wine grocery permit at its Kendallville store location.

33. The beer and wine permit at the Kendallville store will not negatively impact other businesses in the neighborhood or community.

34. To deny GasAmerica's application while granting other similarly situated applicants' applications would be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Ind. Code 7.1-3-19-11.

35. The Local Board denied this application without sufficient evidence that would support a finding that this permit should not be issued.

36. The law is with the Applicant and against the Remonstrators.

37. The initial findings of the Local Board were: 1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; 2) contrary to a constitutional right, power, privilege, or immunity; 3) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; 4) without observance of procedure required by law; or 5) unsupported by substantial evidence. Ind. Code 7.1-3-19-11. Because there was no substantial evidence against the issuance of this permit at either the LB Hearing or the Appeal Hearing, for the Hearing Judge to deny this application would not be supported by substantial evidence.

Therefore, it is ORDERED, ADJUDGED AND DECREED that the finding of the Local Board to deny this application was not based on substantial evidence and must fail.

It is hereby further ORDERED, ADJUDGED AND DECREED that the evidence adduced at the LB Hearing and the Appeal Hearing was in favor of the Applicant, and the appeal of GasAmerica Services, Inc. for this Type 115 permit, Permit No. DL57-23121, is granted, and the permit applied for at its Kendallville store location is hereby GRANTED.

DATED: August 12, 2008

U-Jung Choe, Hearing Judge